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No. 91-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a municipal ordinance that suppresses advertising by real estate brokers in order to maintain the current racial balance of the municipality's population violate the First Amendment and the Equal Protection Clause?

II. Does a municipality violate the due process right of fair notice of the conduct prohibited when it prosecutes all business communications from real estate brokers under an ordinance that prohibits only communications "intended to induce the sale, rental or listing" of a dwelling?

III. Does a municipal ordinance restricting the size, number and placement *only* of real estate "for sale" signs in order to maintain the current racial balance of the municipality's population violate the First Amendment?

IV. Does a municipal affirmative marketing plan whose purpose is to increase the likelihood that whites, rather than blacks, will purchase three specific homes in that municipality violate the Equal Protection Clause?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Greater South Suburban Board of Realtors® and National Association of Realtors®, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on June 19, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 935 F.2d 868, and is reprinted in the Appendix hereto, pp. 1-59 (hereinafter cited as "App., p. ____").

The opinion of the United States District Court for the Northern District of Illinois is reported at 713 F.Supp. 1068, and is reprinted in the Appendix hereto, pp. 64-136.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1991. (App., p. 60.) A timely petition for rehearing was denied on September 5, 1991. (App., p. 62.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Fourteenth Amendment:

> §1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

The nine Municipal ordinances involved are reproduced at pp. 139-148 of the Appendix. There are five anti-solicitation ordinances (Matteson Article IV, §§32.100; Glenwood Article IV, §§28-21; Hazel Crest §§ 14-32 and 14-27; Country Club Hills §§ 19.2.01, 19.6.01 and 19.6.02; and Park Forest §§ 24½-2 and 24½-3) and four sign ordinances (University Park §1272.07(a)(2); Country Club Hills §§ 15.11.11; Matteson §§ 159.55.11 and Park Forest §31-147(d)) at issue.

STATEMENT OF THE CASE

The Parties

Petitioner the National Association of Realtors® (NAR) comprises approximately 829,000 licensed real estate brokers and sales agents ("Realtors" or "brokers") located throughout the United States. NAR's relevant organizational goals are to: (1) help its members understand and comply with laws governing the sale of housing, and fair housing laws in particular; (2) promote the benefits of the Realtor designation to the public; and (3) establish a free and open housing market that operates without regard to race. (*See* App., p. 85.) Petitioner the Greater South Suburban Board of Realtors® (GSSBR) is a member local board of the NAR.[1] As a member of the NAR, the GSSBR shares the NAR's goals and promotes those goals through a variety of training sessions on topics that include fair housing principles. Twenty to twenty-five of the GSSBR's approximately 170 member real estate firms are owned and operated by black brokers. Black brokers tend to serve black homeseekers, while white homeseekers favor white brokers. (*Id.*, pp. 68-69.)

[1] The NAR and GSSBR both are Illinois not-for-profit corporations. Neither has a parent or subsidiary.

Respondents the Cities of Blue Island and Country Club Hills and the Villages of Calumet Park, Glenwood, Hazel Crest, Matteson, Park Forest, Richton Park and University Park[2] (the "Municipalities") are suburbs of Chicago. The Municipalities lie in a geographically identifiable region of Illinois known as the South Suburban Area; this region also defines the territory of the GSSBR. (*Id.*, p. 66.)

Respondent the South Suburban Housing Center ("SSHC") is an Illinois non-profit corporation concerned with maintaining racial integration in the South Suburban area. A study of the SSHC commissioned by Park Forest, conducted by the University of Illinois and introduced at trial by the Municipalities found that:

> "[T]he Housing Center is supported by Park Forest Funds, and undertakes its activities at the direct request of the Village. Other governmental bodies contribute additional funds to the Center's operation. . . . [T]his close coordination clearly demonstrates the unity of purpose and direction shared by the Village and the Housing Center. Viewing the activities of the Village and the Center in their totality, it seems that they have a sufficiently close nexus to make it fairly likely that they would be regarded as 'state action' for the purpose of the Fourteenth Amendment." (Joint Appendix (filed in Court of Appeals, hereinafter "Jt. App.") 887-88.)

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[2] Because of the similarity among the challenged ordinances of the nine municipal respondents, the District Court entered two agreed orders providing that it would "make no findings and grant no relief" with respect to Blue Island, Calumet Park, Richton Park and University Park (except as to University Park's sign ordinance). (*Id.*, p. 85, n.5.) Those four municipalities agreed to abide by any relief granted by the court regarding ordinances substantially identical to any of their own. (*Id.*)

Racial Change In Chicago's South Suburbs

The Municipalities once were all-white communities. In the 1960s and 1970s, significant numbers of blacks moved to these communities. In 1980, 12% of Country Club Hills' residents and 44.3% of University Park's residents were black. (App., pp. 86-88.) At the time of trial (1987), estimates placed the black populations of Hazel Crest at 25-30%, Glenwood at 15-20%, and Matteson at 12%. (*Id.*) Racial change has occurred unevenly across the South Suburban Area. Some parts of the Municipalities remain exclusively or predominantly white, while others are predominantly black.

The District Court found that the Municipalities are "threatened with resegregation." (*Id.*, p. 68.) The court traced this threat to a "complex mix of market forces," including the preference of some whites and some blacks to live in segregated communities, a belief that high concentrations of blacks lower home values, and an expectation that integration eventually will give way to resegregation. (*Id.*) The court also found that brokers respond to their customers' housing preferences, rather than "promoting integration for the sake of integration." (*See Id.*, pp. 68-69.) "Accordingly, they are followers and not leaders of change in housing patterns." (*Id.*, p. 69.)

The court did not identify any illegal or invidious activity currently underlying the process of racial change in the South Suburbs. Nor did the court find any evidence of sudden, wrenching, or panic transition. Instead, gradual racial change has come to the South Suburban Area because a large number of comparatively young, well-educated and financially stable blacks would like to raise their families in these pleasant communities, and many whites, who are free to live wherever they choose, have chosen not to live near blacks. (Jt. App. 277, 445-46, 485-500, 889-90; Tr. 453, 621, 6809-10.)

Residents' beliefs that increases in black population in the Municipalities would lead to declines in home values and resegregation are based on stereotypes and misperceptions. Whites tend to perceive that black influx lowers the status of their communities (Jt. App. 486); in fact, however, new black residents of Park Forest on average are better educated, better employed and better paid than the Village's predominantly white long-term residents (Jt. App. 889-90). Similarly, the Municipalities' expert, Professor Gary Orfield, and the Realtors' expert, Dr. Brian Berry, agreed that whites often exaggerate the extent of racial change in their communities. (Jt. App. 498-500, 592.) Municipal officials knew these stereotypes and misperceptions were at work in the Municipalities. Ronald Bean, President of Park Forest from 1981 to 1986, testified: "In some neighborhoods [residents] get on the phone [to Village officials] when they [see] the first black walking down the street or driving by." (Jt. App. 310.)

The Municipalities' Integration Maintenance Programs

In order to prevent further increases in their black population, the Municipalities launched "Integration Maintenance" programs in the early 1980s. The Municipalities added provisions to their fair housing ordinances curtailing real estate "solicitation," imposed outright bans, extensive restrictions, or both on real estate "for sale" signs, and Park Forest and SSHC used "affirmative marketing" to influence whites, rather than blacks, to purchase three homes on Apache Street in Park Forest.[3]

[3] The Municipalities' Integration Maintenance programs involve other elements that are not at issue in this petition such as data collection, counseling, testing and other activities.

Anti-Solicitation Ordinances

The anti-solicitation ordinances forbid real estate brokers to "solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the [Municipality] that he does not desire to be so solicited." (App., pp. 111-112.) The ordinances define "solicit" or "solicitation" as communications which are "intended to induce the sale, rental or listing for sale or rental" of the recipient's dwelling. (*Id.*, pp. 112-113.) Direct mail, leaflets and pamphlets delivered to, in-person contacts at, and telephone calls to dwellings are prohibited. (*Id.*) The ordinances require each Municipality to deliver to each GSSBR member firm a list of residents who participate in the Municipality's anti-solicitation program. (*Id.*) (Non-members of the GSSBR apparently are not affected by the ordinance.) Except in Park Forest, violations of the ordinances are punishable by fines of up to $500 (*id.*, p. 113) (each piece of mail, leaflet and call is a separate violation); Park Forest leaves its penalty to the discretion of its Village Board (*id.*).

The District Court found that, "[t]he municipalities . . . employ anti-solicitation ordinances in their integration maintenance programs." (*Id.*) The court also found that the ordinances are:

> based on the *desire to protect residents from exposure to advertising* because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. *As with 'for sale' sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities.* (*Id.* (citations omitted, emphasis added).)

Most current homeowners in the Municipalities are white; most homeseekers are black. (*See Id.*, pp. 86-88; Jt. App. 943, 946; MX 507A, 508B.)

Neither the text nor legislative history of the original Municipal ordinances mentioned the word "privacy." A purported privacy interest first appeared when, as the District Court found, the Municipalities amended the ordinances "on the advice of their trial counsel," and "[i]n response to the instant suit and [other] suits challenging Hazel Crest and Matteson's ordinances." (*Id.*, p. 114.) Based on references in these mid-litigation amendments, the District Court found that privacy was "[a]nother purpose of the anti-solicitation ordinances." (*See id.*, p. 115.)

The District Court found that "[t]he anti-solicitation ordinances are designed to make solicitation more difficult and expensive." (*Id.*, pp. 114-115.) Cooperative bulk mailing and mass marketing by direct mail companies, which are brokers' most cost-effective advertising media, illustrate this effect. It is neither commercially feasible nor desirable for these companies to "target" mailings to non-signatories. Therefore, the participation of even a single resident in a mass mailing zone effectively denies brokers the use of this medium, even to reach residents who have not agreed to participate in municipal anti-solicitation programs. (Tr. 2083-84, 3980-85.)

Ironically, the success of the Municipalities' anti-solicitation programs depends directly upon how vigorously the Municipalities solicit residents' participation. (*See App.*, p. 115.) Hundreds of households participate when Municipalities repeatedly solicit residents by mail and in person. (Jt. App. 1184-85, 1190-91, 1194-95, 1196-98.) In contrast, Park Forest did not solicit residents' participation; only 10 of approximately 9000 households placed their names on that municipality's anti-solicitation list. (Tr. 5151-52; MX 421.)

An example of the scare tactics employed in Municipal anti-solicitation campaigns is a newsletter Matteson sent residents urging them to sign anti-solicitation notices to prevent "panic peddling" and blockbusting:

> Unscrupulous real estate people will use the panic peddling methods as part of their selling practices, particularly during soliciting, in order to create alarm among residents . . . . Real estate people who created the alarm will begin "steering" minorities into the area in increasing numbers while steering whites away, until it becomes resegregated or changed. (Jt. App. 1184-85.)

Matteson's newsletter did not advise residents that blockbusting and panic peddling in fact were not occurring in Matteson or the other Municipalities (Jt. App. 636-37), or that Federal, State and other municipal laws all independently, and directly, prohibit blockbusting and panic peddling.

The District Court found that, "[j]ust before trial the municipalities distributed a letter stating that they believe *every* 'business communication' from a real estate broker is a solicitation to list or sell—despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale.*" (App., p. 120 (emphasis in original).) The Municipalities thus "interpret their ordinances to ban all business communication mailed or delivered by real estate brokers, even if their intended purpose was only to generate goodwill, such as holiday calendars, birthday greetings, the sales of investment or vacation property, or to find buyers or referrals." (*Id.* at 115.) The District Court also found that this interpretation reflects "uncertainty of the meaning of the term 'solicitation,' " which "greatly exacerbate[s]" the effect of the ordinances. (*Id.*) Most marketing materials used by brokers do not attempt to induce a sale or listing for sale. (*E.g.*, DX 179, 187, 200, 495.) Because of the threat of prosecution and uncertainty

about what constitutes prohibited communications, however, some brokers have ceased all marketing activities in anti-solicitation municipalities. (*E.g.*, Jt. App. 1172-83.)

"For Sale" Sign Restrictions

The District Court found that " '[f]or sale' signs are a cost effective and valuable form of advertising which benefits homesellers, who get exposure for little cost; homeseekers, for whom signs may be a direct source of information about the availability of homes; and brokers, for whom signs provide a source of sales and a measure of goodwill advertising." (*Id.*, p. 106.) Each of the Municipalities, however, "regulate[s] the use of 'for sale' signs differently from other signs." (*Id.*, pp. 104-106.)

University Park banned "for sale" signs until after the trial began, at which point it repealed its ban and imposed instead an ordinance allowing only one sign per property, which must be placed in a window of the house. (*Id.*, pp. 104-106.) Glenwood also banned "for sale" signs until the eve of trial, despite its Village Attorney's advice that the ban was "patently unconstitutional" under *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). (App., p. 105.) Glenwood disregarded this advice because it concluded "the only result" of a legal challenge would be "to drop [the] ban." (Jt. App. 1156.)

Country Club Hills restricts the size of "for sale" signs to three square feet and three feet in height, permits only one sign per property, and requires its placement within three feet of, and parallel to, the front of the house. (App., pp. 105, 139.) Matteson restricts "for sale" signs to eight square feet and five feet in height; Matteson also permits only one sign per lot and requires that it be placed within 15 feet of the house. (App., pp. 105-106, 140.) Park Forest permits only one sign per lot, and limits the sign to five

square feet, including the frame or post. (App., pp. 105-106, 140.)

Each of these restrictions effectively prohibits the use of most or all industry standard-sized signs (such as "Century-21" signs) and requires brokers to purchase more expensive, less effective custom-manufactured signs for use in each municipality. (Tr. 3823-25.) Uncontroverted testimony established that these size and placement restrictions "practically eliminate" the effectiveness of the signs. (Tr. 3829, 5914.)

The District Court found that the Municipalities enacted their sign restrictions in order to prevent further increases in their black populations:

> "A proliferation of 'for sale' signs is widely perceived to be destablizing to an integrated community. The court therefore finds it reasonable for a municipality to minimize the appearances of 'for sale' sign proliferation so that the community has an opportunity to present the counter message that panic avoidances can lead to a stable integrated community." (App., pp. 106-107 (citations omitted).)

(Despite the court's reference to "panic" in this finding, it is undisputed that no panic selling was occurring at the time of the trial in the Municipalities. The court so found expressly in declaring Hazel Crest's sign ban unconstitutional (*id.*, p. 110), noted that "the [racial] situation had stabilized by . . . 1980" in the subdivision with the largest black population in Park Forest (*id.*, p. 72), and found no evidence of panic transition in any part of any Municipality.)

This finding was supported by uncontroverted evidence of Municipal intent to limit minority demand for homes through sign restrictions. Country Club Hills, for example, enacted a voluntary "for sale" sign restraint program designed to "stop some of the [homeseeking] traffic that

we have on ride throughs." (App., p. 105.) Uncontroverted evidence demonstrated that black homeseekers are more dependent on signs as a source of housing information than are white homeseekers, particularly when they are hoping to move to a predominantly white community. (Tr. 2079-80; 4679-81; 4716-17; 7771.) The sign restrictions also have a disproportionate negative impact on black real estate brokers who, being relatively new to predominantly white suburbs, are particularly dependent upon signs as a means of both marketing their listings and establishing their presence in the community. (Tr. 2052-53; 2611-12; 4097; 7771.)

The District Court noted that the preambles to the sign ordinances declared that their purpose is "community aesthetics." (*Id.*, pp. 104-106.) In contrast to their integration maintenance purpose, however, the court made no findings as to how regulating real estate signs differently from all other signs promotes "community aesthetics."

The Apache Street Affirmative Marketing Plan

Apache Street is located in the Eastgate subdivision of Park Forest. (App., p. 71.) In the 1970s, a subdivision in neighboring Chicago Heights was built and marketed, successfully, to black residents of Chicago. *Id.* Racial turnover ensued in an adjoining Chicago Heights subdivision. (*Id.*) These developments sparked rumors in the early 1970s that Eastgate was "going black." (*Id.*) By 1980, however, "the situation had stabilized;" Eastgate was 25% black and Apache Street was 56% black. (*Id.*)[4]

[4] The trial court found that "VA and FHA mortgage foreclosures in Eastgate leading to abandoned homes and neighborhood blight were an ongoing problem" (*id.*), but made no finding as to the race of defaulting mortgagors.

Still, in 1982, Village officials received frequent complaints from Eastgate and Apache Street residents expressing a "perception" that Apache Street was "a black block." (Jt. App. 294; *see* App., p. 72.) Village officials knew this perception was inaccurate (Jt. App. 299-301), and an overreaction (*id.* 297). Nevertheless, Ronald Bean, Park Forest's President in 1982, testified that, "whether the neighborhood was or was not a predominantly minority neighborhood was not as important as what the people in the area believed it to be." (*Id.* 294.)

Bean continued, "it would not do us any good" to try to correct this misperception with facts. (*Id.* 301.) Instead, Bean said, Village leaders felt they had to "do something." (*Id.*) "And one of the things we felt we had to do was to buy those three abandoned homes and have them marketed and try to increase white traffic." (*Id.*) Thus the Village purchased vacant homes at 9, 15 and 26 Apache Street ("the Apache Street homes"). (App., pp. 72-73.) Park Forest then sold the homes to SSHC. *Id.* Bean testified, "we in our contract with [SSHC] asked that the properties be affirmatively marketed to the population we felt based on information was going to be underrepresented; that is, whites." (Jt. App. 299.)

The SSHC entered into listing agreements with broker William Motluck for the Apache Street homes. The listing agreements conditioned payment of a sales commission upon Motluck's compliance with an affirmative marketing plan ("AMP"). (App., p. 73.)

The AMP provided that Motluck was to make a special outreach to whites by advertising in newspapers with a predominantly white circulation and distributing information to selected rental developments and employers where whites could be reached. (*Id.*) Although the listings forbade "any action which prohibits, restricts, narrows or

limits the housing choice of any client on the basis of race," (*id.*), training materials prepared by SSHC for a seminar required by the AMP instructed Motluck's sales agents not to tell blacks about the Apache Street homes unless asked about them specifically (Jt. App. 1147). And although the AMP provided that Motluck was to use his best efforts to attract minority and majority persons to the Apache Street homes, former President Bean testified that Park Forest preferred that Motluck not advertise the homes at predominantly black rental developments. (Jt. App. 290.)

The District Court found that the Apache Street AMP has "a racially disparate impact." (App., p. 80.) The court also found that the AMP adversely affected the availability of housing by increasing the likelihood the Apache Street homes would be sold sooner or at a higher price. (*Id.*, p. 99, n.7.) SSHC admitted that "a possible consequence of successful implementation of the Plan would be to increase the likelihood that a white would buy, and decrease the likelihood that a black would buy the Apache Street homes." (R-92, pp. 14-15.) SSHC also admitted that "the intended effect of the Plan is to discriminate between the races." (*Id.*)

The District Court found that the AMP's disparate impact "is lessened if [not] non-existent" because SSHC's affirmative marketing "works both ways." (App., p. 99, n.7.) The SSHC's promises of outreach to blacks as well as whites, however, evaporated in practice. In fact, the Apache Street AMP is the only such affirmative marketing effort undertaken to date by any of the Municipalities, even though each is predominantly white and has areas that are almost exclusively white. (Jt. App. 422-23, 531-32, 580-81.) Apart from encouraging *Realtors* to conduct affirmative marketing—which they already do in a dramatically

different form under agreement with the United States Department of Housing and Urban Development[5]—the only outreach to blacks undertaken by SSHC was a newspaper advertisement urging blacks to move to Chicago's southwest suburbs, an identifiable area distinct from the South Suburban Area. (Jt. App. 1104.)

The Apache Street AMP failed to secure white buyers, although the houses were sold. The ordinance that authorized Park Forest's purchase and sale of the Apache Street homes remains in effect. The SSHC resolved to use the profits from the sale of the Apache Street homes to fund another AMP. (PX 14.)

Petitioners' Challenges To Respondents' Integration Maintenance Programs

Petitioners contend the anti-solicitation ordinances violate their First Amendment rights by suppressing truthful information about real estate for the impermissible purpose of maintaining the racial status quo. Petitioners

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[5] The NAR, GSSBR and their members participate in a Voluntary Affirmative Marketing Agreement with HUD ("the VAMA"). (App., p. 70.) When originally conceived in the 1970s in response to enactment of the Fair Housing Act of 1968, the VAMA defined affirmative marketing "as a program to inform the *minority community* of the homes listed for sale or rent by Realtors, of the services offered by Realtors in selecting a home for purchase, and of the availability of these homes and services to all buyers without regard to race, color, religion, sex or national origin." (*Id.* (emphasis in original).) The District Court found that "[t]his form of affirmative marketing is justified as remedial; i.e., to open up areas that had previously been closed to minorities because of past discriminatory practices." (*Id.*) In the 1980s, NAR and HUD reviewed and revised the VAMA, as required by its terms. In the current version, the NAR adopted a proposal, made by HUD, that calls for color-blind marketing practices. (DX 550 at 2; Tr. 1516-18, 1526, 1641-42.)

contend that the Municipalities' purported interest in privacy is insincere, and insufficient in any event, because the ordinances ban communications only about a single viewpoint and ban a form of communication that easily may be ignored. The ordinances also violate brokers' equal protection rights because no demonstrable relationship exists between the Municipalities' purported privacy interest and the ordinances' discrimination against a particular viewpoint. Further, the ordinances' failure to clearly define the speech they prohibit renders them unconstitutionally vague, in violation of Petitioners' due process rights.

The Municipalities' "for sale" sign restrictions also violate the First Amendment rights of Petitioners and their clients because they impose special restrictions on real estate advertising to promote an impermissible interest in maintaining the racial status quo.

Finally, the Apache Street AMP violates the equal protection rights of Petitioners' black members and customers by employing an improper racial classification to manipulate the housing decisions of prospective residents. (Petitioners' other challenges to these laws and activities, and to other aspects of the Integration Maintenance programs, are not asserted in this Petition.)

Petitioners sought a declaration that the ordinances and the Apache Street AMP are unconstitutional. The District Court had jurisdiction over those claims under 28 U.S.C. § 1331.

The District Court's Ruling

The District Court ruled that the anti-solicitation laws violate Petitioners' First Amendment and due process rights "insofar as they prohibit forms of communications

from brokers to signators of the municipal anti-solicitation lists other than solicitations actually seeking to induce the sale, rental or listing of dwellings." (App., 117-119.) The court based its First Amendment ruling on its conclusion that the ordinances' "effect of banning all communication by mail from Realtors is far more extensive than necessary." (*Id.*, p. 118.) The court's due process ruling followed its conclusion that the definition of solicitation in the ordinances "could be interpreted (and is by [the Municipalities]) to include virtually anything, such as an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office." (*Id.*, p. 119.) The court also concluded that the text of the ordinances provides insufficient warning that the Municipalities would consider "*every* 'business communication' from a real estate broker [to be] a solicitation to list or sell—despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale.*" (*Id.* (emphasis in orig.)) The court did not rule on Petitioners' equal protection claim.

The court ruled that the Municipalities' "for sale" sign restrictions are reasonable time, place and manner restrictions and therefore do not violate the First Amendment.

Finally, the court held that the NAR and GSSBR lack standing to assert an equal protection challenge to the Apache Street AMP because that "claim would clearly rest on legal rights of minority homebuyers rather than those of homesellers." (*Id.*, p. 104.)

The Court Of Appeals' Ruling

The Court of Appeals upheld the anti-solicitation ordinances in their entirety, affirming in part and reversing in part the District Court's ruling. The court's statement

of facts acknowledged the District Court's finding that "the ordinances are designed to . . . maintain the [racial] status quo and to reduce the ability of homeseekers to find homes in the municipalities," but the court's analysis ignored this finding and instead focused entirely on a purported interest in protecting residential privacy. (App., p. 37.) The court perceived no vagueness in the ordinances because it "fail[ed] to see a 'substantial risk of miscalculation' " as to the meaning of "solicitation" if brokers refrained from *all communications* to participating homeowners. (*Id.*, p. 52, emphasis added.) Finally, the court held that its ruling on Petitioner's First Amendment claim foreclosed their equal protection claim because the court "fail[ed] to see any distinction between the First Amendment 'sufficient fit' analysis and the Fourteenth Amendment's 'rational basis' inquiry." (*Id.*, 53.)

The court upheld the Municipalities' "for sale" sign restrictions. It accepted the ordinances' declared purpose—community aesthetics, again ignoring the District Court's sole efficacy finding: that the ordinances are a reasonable measure to minimize the advertising value of the signs and thus prevent racial change. (*Id.*, pp. 54, 106-107.) The Court of Appeals then ruled that the ordinances directly advance an interest in aesthetics because uniform, regulated placement "will not prove as unsightly as haphazard placement," but cited no finding—by either the Municipalities or the District Court—that owners hoping to sell their homes place "for sale" signs in an unsightly, haphazard fashion. (*Id.*, pp. 54-55.) Finally, the court perceived a reasonable fit between the restrictions and an aesthetic purpose because it concluded homeseekers are able to learn of available housing despite the restrictions. (*Id.*, p. 55.)

Like the District Court, the Court of Appeals did not consider the constitutionality of the Apache Street AMP because it concluded Petitioners lack standing to assert

that challenge. (*Id.*, p. 21.) The court acknowledged that Petitioners demonstrated sufficient "injury in fact" to satisfy Article III's case-or-controversy requirement. (*Id.*, pp. 17-18.) The court concluded, however, that "prudential" considerations foreclose a review of the merits because Petitioners' claim rests on the rights of third parties: homeseekers. (*Id.*, p. 18.)

REASONS FOR GRANTING THE WRIT

The three municipal activities at issue in this Petition implicate different aspects of a single question: whether a municipality may attempt to manipulate its real estate market to preserve its character as an integrated but predominantly white community? This Petition raises important subsidiary questions as well. May a municipality shield such manipulation of its real estate market from effective judicial review by reciting non-racial justifications such as protection of residential privacy and community aesthetics? Do Realtor organizations, whose members include black brokers and represent black homeseekers, have standing to challenge a municipal program born of the municipality's conclusion that it had to "do something" to assuage white residents' perception that their neighborhood already had too many black residents and designed to diminish the likelihood that blacks would succeed in purchasing three specific homes in that neighborhood?

These questions are of exceptional and growing importance. They "bear on one of the most important decisions [residents] have a right to make: where to live and raise their families." *Linmark Assocs.*, 431 U.S. at 96. As minorities follow better employment and housing opportunities from central city to suburban areas, minority homeseekers and predominantly white suburbs increasingly confront these questions. Indeed, suburban housing opportunity will be a principal topic in race relations for years to come. The

Municipalities' proximity to Chicago's south side cast them among the first suburbs to attempt to maintain racial balance; now many other suburban communities look to that experience—and this case—for guidance in discerning government's proper role, if any, in maintaining racial balance in the housing market. (*See, e.g.*, The Washington Post, June 29, 1991, §E (Real Estate) at 1, quoting the attorney for SSHC, "It's likely that there will be renewed interest now in affirmative marketing as a real estate marketing technique. I think we will see increased use of ordinances of this type on the part of municipalities.")

I.

The Anti-Solicitation Laws Violate Petitioners' First Amendment And Equal Protection Rights By Stifling Expression Of Their Viewpoint In Order To Manipulate Residents' Housing Choices.

Brokers attract referrals and listings by distributing an eclectic variety of written materials. These materials may include certificates for a free evaluation of a home's market value, information about the broker's credentials, holiday greeting cards and calendars, announcements of promotional contests, and catalogues of homes available for sale. Brokers also may use telephone calls to identify residents who are interested in their services. The Court of Appeals found that such advertising "concerns lawful activity and is not misleading." (App., p. 39.)

A. First Amendment

The Court of Appeals analyzed Petitioners' First Amendment challenge under the four-part test for determining the validity of a restriction on commercial speech described in *Central Hudson Gas and Electric Co. v. Public Service Comm'n*, 447 U.S. 557 (1980). (App., p. 38.) Although Petitioners' speech does indeed concern a pro-

posed commercial transaction, the purchase or sale of a home is the largest and most important transaction most people ever make. For many, the significance of this transaction overshadows political events and other subjects of "pure speech," at least while a housing decision is pending. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). Furthermore, brokers speak not just for themselves, but for their homeseeking and homeselling clients. Thus a free market evaluation, for example, is more than an offer of professional services; it conveys the broker's belief that one of her customers, or another interested buyer, would pay a certain price for a particular home.

This Court has found that commercial speech which "implicates 'substantial individual and societal interests' [and] relates to activity which is protected from unwanted state interference" serves a "paramount" First Amendment interest. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)); *see Linmark Assocs.*, 431 U.S. at 96-97 (societal interest in real estate advertising is no less than interest in advertising of constitutionally protected abortion services at issue in *Bigelow*). Nevertheless, the Court of Appeals described Petitioners' speech as "merely intended to propose a commercial transaction," (App., p. 40), and therefore deferred broadly to the Municipalities' decision to restrict real estate solicitation. (*Id.*, pp. 45-46.)

One aspect of the court's deference is the "flexibility" it accorded the Municipalities to enact a concededly content-based restriction. (*Id.*, p. 38.) The Court contended such flexibility derives from "the greater potential for deception or invasions of privacy" in commercial speech. (*Id.*, p. 38.) Legislative flexibility based on potential for deception has a basis in this Court's decisions, *e.g.*, *Bolger*, 463 U.S. at 65, but no basis in the facts of this case, since Petitioners' speech "concerns lawful activity and is not

misleading." (App., p. 39.) No precedent, however, supports a flexibility to enact content-based restrictions to protect privacy. *E.g.*, *Carey v. Brown*, 447 U.S. 455 (1980) (holding that an interest in protecting residential privacy fails to justify content-based restriction on speech). The Court of Appeal's ruling on this issue also conflicts directly with the Sixth Circuit's recent ruling that content-based restrictions on truthful commercial speech "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Discovery Network Inc. v. City of Cincinnati*, 946 F.2d 464, 473 (6th Cir. 1991) (quoting *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (1991) (White, J., dissenting)).

Because the anti-solicitation ordinances restrict only real estate advertising, all other speakers are free to contact residents. By countenancing a torrent of junk mail on such comparatively insignificant topics as fast food and dry cleaning services, the anti-solicitation laws are "a rather feeble approach" to the Municipalities' purported privacy interest. *Curtis v. Thompson*, 840 F.2d 1291, 1307 (7th Cir. 1988) (Ripple, J.; dissenting), *app. pending after remand*, No. 89-3248. The record contains no evidence, and neither lower court found, that real estate solicitation is a greater threat to residential privacy than advertising on other topics, *see id.*, or indeed, that it poses a cognizable threat at all. *E.g.*, *Bolger*, 463 U.S. at 72 (the First Amendment does not permit the government to prohibit mailings as intrusive because recipients can simply throw them away), *id.* at 78 (Rehnquist, J., concurring) (mailings are less intrusive than other forms of speech for the same reason). *See also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (handbilling and solicitation in residential areas are "fundamentally different from" picketing because in such cases "the flow of information [is not] into . . . household[s], but to the public") (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971)).

Thus the protection of residential privacy cannot have been a genuine purpose underlying these laws. *E.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

Instead, privacy concerns plainly were a *post-hoc* rationalization conceived by the Municipalities' trial counsel in response to this suit. (*See* App., p. 114 (amendments containing first mention of "privacy" were enacted on advice of trial counsel).) *See also Schweiker v. Wilson*, 450 U.S. 221, 244-45 (1981) (Powell, J., dissenting) (Court should receive with skepticism *post-hoc* hypotheses about legislative purpose, and scrutinize legislation more closely); *Craig v. Boren*, 429 U.S. 190, 199 n.7 (1976) (court will not credit "a convenient, but false, *post-hoc* rationalization"). In conflict with the principle of *Craig* and *Wiesenfeld*, the Court accepted this *post-hoc* rationalization without any discussion, and never addressed in its analysis the District Court's finding that "the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities." (*See* App., p. 113.)

The Court of Appeals concluded that the ordinances directly advance a purported interest in privacy, but never said how. (App., pp. 44-45.) Moreover, the court never addressed the conflicting principle, plainly established by decisions of this Court, that privacy concerns do not justify stifling Petitioners' generally-directed speech because residents may simply throw away written material, hang up the phone, or post content-neutral "no solicitation" signs.[6] *See, e.g.*, *Frisby*, 487 U.S. at 487; *Bolger*, 463 U.S. at 72; *Consolidated Edison Co. v. Public Service Comm'n*,

[6] Each of the Municipalities has a content-neutral "no solicitation" law on its books to protect residential privacy. (DX 527, 540-43.) Tellingly, however, the Municipalities did not add their real estate solicitation laws to these ordinances, but rather to their fair housing laws, which deal with racial issues.

447 U.S. 530, 542 (1980); *see also Martin v. Struthers*, 319 U.S. 141 (1943) (upholding content-neutral "no solicitation" laws); *cf. Schultz v. Frisby*, 807 F.2d 1339, 1371 (7th Cir. 1986) (Coffey, J., dissenting) (telephone communications allow the listener to turn off the message, as the Supreme Court requires, and thus protect his own privacy), *vacated on other grnds.*, 818 F.2d 1284, *aff'd* in banc, 822 F.2d 642, and *rev'd*, *Frisby v. Schultz*, 487 U.S. 474.

The Court of Appeals upheld the ordinances largely on the basis of *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), and its sharply divided decision denying a preliminary injunction in *Curtis v. Thompson*, 840 F.2d 1291 (1988), *app. pending after remand*, No. 89-3248. In *Rowan*, this Court upheld a statute that permits a householder to bar from his mailbox any material he finds, in his sole discretion, to be offensive. 397 U.S. at 737. The Court of Appeals here recognized that both the concurring and dissenting judges in *Curtis* believed that the content-neutrality of the *Rowan* statute distinguished it from content-based anti-solicitation laws because content-based laws install government, rather than residents, in the role of censor. But the court responded by pointing to dicta in *Rowan*: "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. It then concluded, without explanation, that this language "has implications far beyond the statute at issue there." (App., pp. 47-48.)

In fact, this Court's decisions subsequent to *Rowan* demonstrate that the Court of Appeals read the *Rowan* dicta far too broadly. As noted above, this Court has held repeatedly that government may not ban communications which are easily ignored by recipients. Furthermore, the anti-solicitation ordinances' content-based discrimination remains a crucial distinction; "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular view points." *Bolger*, 463 U.S. at 80 (Rehnquist J., concurring). Indeed,

this principle has particular urgency here because any broker attempting to request such permission would: (1) have to overcome the effect of municipal campaigns to incite and organize residents against his speech; and (2) be prosecuted by the Municipalities under their theory that "any business communication" from a broker is a prohibited solicitation. (*See* App., p. 52 (brokers must refrain from further communication when notified of a resident's participation in municipal anti-solicitation program).) The Court of Appeals decided, however, that there is "no problem," (App., p. 53), when a Municipality vigorously presses on residents its viewpoint concerning an important public issue while it stifles brokers' expression of an alternative viewpoint.

B. Equal Protection

Even if one were to credit the Municipalities' purported interest in privacy, a restriction on real estate advertising alone bears absolutely no logical relationship to this purpose. Nevertheless, the Court of Appeals rejected Petitioners' equal protection claim because it believed the "reasonable fit" between the ordinances and the Municipalities' asserted privacy interest satisfied the "rational basis" test applied to a restriction on advertising of casino gambling in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 344 n.9 (1986).

Petitioners pointed out that *Posadas* concerned advertising of an activity that the government could ban altogether, while Petitioners' speech concerns an activity—housing choice—that ranks at the top of our hierarchy of social values. *See Linmark Assocs.*, 431 U.S. at 96; *compare Posadas*, 478 U.S. at 345 (noting the "crucial distinction" between the instant case and cases striking down restrictions on advertising concerning activities that are constitutionally protected and may not be prohibited completely by the State). The Court of Appeals dismissed this argument, again relying on *Rowan* to conclude there is "no

problem" when a municipality singles out a particular viewpoint for suppression, so long as residents choose to participate in the government's censorial scheme. (App., p. 53.) This analysis not only misreads *Rowan*, but it also embraces the unequal treatment of speakers precisely *because* the government disapproves of their viewpoint on a pressing public issue. Indeed, the court's ruling opens the way for government to pursue a limitless variety of "public policies" through purportedly "privacy-based" restrictions on commercial speech.

II.

The Anti-Solicitation Laws Violate Petitioners' Due Process Rights By Failing To Define The Speech Prohibited By Those Laws.

The District Court found that the text of the anti-solicitation ordinances, which defines "solicitation" as a communication "intended to induce the sale, rental or listing" of a home, fails to warn brokers that the Municipalities will prosecute every "business communication" from them to a resident. (App., p. 1096.) Therefore the court held the ordinances unconstitutionally vague. (*Id.*) The Court of Appeals reversed, ruling that it saw "no substantial risk of miscalculation" if brokers simply "refrained from further communication to these addresses." (App., p. 52.) This Court, however, has not required those subject to a criminal law to cease all arguably prohibited activity in order to resolve vagueness in the law's terms. *A fortiori*, brokers should not be forced to cease speaking about topics plainly permitted by the law's language—such as an advertisement seeking *buyers* for homes that already are for sale (DX 200, 495)—simply because a government official sent a letter saying the government would interpret the law to prohibit all communications about those topics. The Court of Appeals' ruling thus conflicts in principle with *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (ordinance unconstitutionally vague if

it fails to inform citizens what conduct is prohibited and vests broad and standardless discretion in local officials).

III.

The Municipalities' Sign Restrictions Violate The First Amendment Because They Are Intended To Preserve The Racial Status Quo In the Municipalities.

There is substantial evidence in the record that the Municipalities enacted their sign restriction ordinances in order to influence the housing choices of their residents to prevent a change in the racial balance; indeed, the District Court found it was "reasonable" for them to do so. (App., p. 160.) The Court of Appeals never mentioned this finding; like the District Court, it accepted as genuine the declared purpose of promotion of aesthetic concerns, despite citing no evidence to support this conclusion beyond the mere recitation of this interest in the ordinances' preambles. (*Id.*, p. 54.)

This Court, however, has rejected the notion that a law that restricts real estate signs more severely than signs bearing any other content "promote[s] aesthetic values or any other value 'unrelated to the suppression of free speech.' " *Linmark Assocs.*, 431 U.S. at 93 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (courts must carefully scrutinize purported aesthetic judgments "to determine if they are only a rationalization of an impermissible purpose"). Careful judicial scrutiny is particularly necessary here because the race-related purpose the District Court found "reasonable" is so similar to the purpose this Court found impermissible in *Linmark Assocs.*:

> "The Council has sought to restrict the free flow of [information pertaining to sales activity in Willingboro] because it fears that otherwise homeowners

> will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town." 431 U.S. at 96.

The *Linmark Assocs.* Court held that the First Amendment denies government the "sweeping powers" to manipulate its residents' housing choices in this fashion. *Id.* at 96. The Court of Appeals' refusal to scrutinize carefully these sign laws invested these powers in the Municipalities, in conflict with the principle and holding of *Linmark Assocs.*.

IV.

The Apache Street Affirmative Marketing Plan Violates The Equal Protection Clause Because It Employs A Race-Conscious Measure To Preserve The Racial Balance Preferred By The White Majority.

It is undisputed that Park Forest enacted and SSHC implemented the Apache Street AMP based solely on race. This Court has repeatedly held that such racial classifications "are inherently suspect and thus call for the most exacting judicial scrutiny." *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 291 (1978); *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). As this Court wrote in *City of Richmond v. Croson*:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there

> is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. 488 U.S. 469, 493 (1989).

Had either lower court scrutinized the constitutionality of Park Forest's AMP, it would have been constrained to find that the AMP violates the Equal Protection Clause.

Park Forest offered no compelling interest to justify its preferential treatment of white homeseekers. *See Wygant*, 476 U.S. at 274. This Court has upheld racial classifications only when necessary to remedy past discrimination by the sponsor of affirmative action, but whites have never been the *victims* of racial discrimination by, or even in, Park Forest. Consequently, Park Forest failed to identify specific discrimination "with the particularity required by the Fourteenth Amendment" *Croson*, 488 U.S. at 490-491. Village officials instead chose to respond to popular misperceptions about the racial situation on Apache Street by implementing a race-conscious plan because they concluded that the alternative—an attempt to counter these misperceptions with facts—"would not do us any good."

Park Forest's AMP further fails to meet any of the tests considered by this Court to determine whether a race-conscious plan is "narrowly tailored to remedy . . . past discrimination." *Croson*, 488 U.S. at 497-501; *see Wygant*, 476 U.S. at 475, 483; *Bakke*, 438 U.S. at 310, 320. The *Croson*, *Wygant* and *Bakke* decisions establish that a narrowly-tailored race-conscious remedy is one that: (1) avoids unnecessary harm to innocent third parties; (2) does not rely on an absolute racial preference to the exclusion of other attributes; (3) employs clear standards; and (4) is temporary. The Court of Appeals effectively let stand a plan that offends every one of these principles.

The lower courts failed to strictly scrutinize the Apache Street AMP because they concluded that Petitioners do not have standing to bring this claim. Although the Court

of Appeals agreed that Petitioners have suffered an injury in fact, it erroneously held that Petitioners failed to satisfy "prudential" standing concerns.

The interests of brokers and homeseekers regarding such race-conscious plans are deeply intertwined. Indeed, a broker who implemented the Apache Street AMP by bringing in additional white bidders with the purpose of diminishing the likelihood that a black customer would be able to buy a home would violate the NAR's Code of Ethics and the Fair Housing Act. *See Village of Bellwood v. Dwividi*, 895 F.2d 1521, 1532 (7th Cir. 1990); (Tr. 1478; DX 49 at 29). Furthermore, if the broker's black customer never learns of an Apache Street house or is outbid because another broker brings in additional white bidders, the first broker loses a sales commission. The broker working with the black homeseeker, who likely is black himself and has mostly black customers, will not make up this loss elsewhere; Park Forest has not purchased and affirmatively marketed housing to blacks.

Moreover, Petitioners' black homeseeking prospects are practically precluded from challenging the Apache Street AMP themselves. If the AMP operates as designed, they will never learn that they are its victims. Furthermore, a homeseeker who was outbid by as little as a few hundred dollars for a home is unlikely to be able or willing to finance years of litigation to vindicate his rights.

Finally, the lower courts' reliance on Petitioners decision not to produce a black homeseeker to protest the Apache Street AMP embraces a paternalistic and stigmatizing (to black homeseekers and brokers alike) view that blacks may benefit from a decision by a community's white majority that they would be better off living and working elsewhere. At the same time, it ignores the far more credible view that black homeseekers and brokers alike object to the white majority's conclusion that their interest in Park

Forest is a "problem" that requires municipal "affirmative" action. (Ironically, Petitioners' proposed testimony from an official of a local chapter of the NAACP was excluded by the District Court (Tr. 4872-73) and not considered by the Court of Appeals. That official authored one letter that was admitted; there, she wrote of Integration Maintenance programs: "Racial balancing is anathema for Blacks as we are seen as spoilers of communities. . . . No other group in America is subjugated in this manner." (DX 437.))

In sum, the Court of Appeals' ruling that Petitioners failed to satisfy "prudential concerns" conflicts with this Court's frequently invoked principle that vendors have standing to assert the rights of customers to challenge a law that interferes with the customers' ability to purchase the vendor's goods or services. *E.g., Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989); *Singleton v. Wulff*, 428 U.S. 106 (1976).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals should be granted.

Respectfully submitted,

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